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No. 91-1741

In The

Supreme Court of the United States

October Term, 1991

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Petitioners,

vs.

SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT, HELEN M. BOLEN,

Respondents.

Petition For Writ Of Certiorari To The California Supreme Court

PETITIONERS' REPLY MEMORANDUM

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This Petition squarely presents the discrete issue of whether the number of votes allocated in a special purpose election creating a benefit assessment district must bear any relation to the burden of the assessment in order to satisfy the Fourteenth Amendment's Equal Protection Clause.

Hoping that the less said the better, Respondent Southern California Rapid Transit District ("RTD") makes no effort to explain or justify the random and arbitrary vote allocation scheme of California Public Utilities Code §§ 33000, *et seq.*, based on assessed (*i.e.*, acquisition) value, other than to reiterate its greater "convenience" over the logical and rational method of using the same

basis as the levy (square footage) to allocate the votes. Yet a Constitutional analysis requires a more detailed, almost surgical application of the law. Thus, far, the RTD has succeeded with a blunderbuss, not a scalpel. What is to RTD an "opportunistic attack on an important public measure," is a $200 million dollar bill to the property owners of downtown Los Angeles, often doubling or tripling owners' existing property taxes. What is to RTD a "narrow" issue, is an issue of extreme importance to hundreds of property owners along the subway line yet to be assessed and, indeed, property owners throughout the state who may subject to this increasingly common "benefit assessment" taxation. Whether an utterly sham election format in this huge assessment district is "good enough for government work" merits this Court's attention.

RTD's opposition raises two new arguments that deserve comment:

I. RTD ARGUES FOR THE FIRST TIME IN THIS COURT THAT THE CASE RAISES NO ISSUES OF GENERAL SIGNIFICANCE. RTD'S OWN STATEMENTS BELIE ITS ELEVENTH HOUR ATTEMPT TO DIMINISH THE IMPORTANCE OF THIS CASE.

This Court recognized the importance of the equal protection question in special purpose elections by reviewing the litany of cases cited in the Petition beginning in 1969 with *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583, and continuing to 1989 with *Quinn v. Millsap*, 491 U.S. 95, 109 S. Ct. 2324, 105 L. Ed. 2d 74. Nor is it, as RTD asserts, mere "coincidence" that this Court agreed to hear and decide a rationality challenge on equal protection grounds to

Proposition 13 in *Nordlinger v. Hahn*, No. 90-1912. No matter how that case is decided, this case presents the distinct question of whether the deference inherent in the taxation area, inheres as well when a voting scheme is challenged.

To fully appreciate the significance of this challenge to a statutory violation of equal protection in the voting rights area, one need look no further than RTD's own appeals to the California Supreme Court to exercise its discretionary review. In its Petition for Review below, RTD wrote:

> "The decision also imperils the very existence of a time tested assessment device frequently employed in California and elsewhere to finance public improvements and recapture the windfall benefits flowing from those improvements. . . . This Petition presents significant issues of law and public policy." (Petition for Review at 3.)
>
> "The Court of Appeal's decision in this case, if allowed to stand, has profound implications for special purpose elections of all kinds." (Petition for Review at 6.)
>
> "Granting review in this case is necessary and appropriate because the Court of Appeal's decision creates a conflict among the courts on a constitutional issue implicating special purpose elections and an important social tool for public improvements: the benefit assessment." (Petition for Review at 24.)

In its brief on the merits in the California Supreme Court, RTD wrote:

> "In an era of increasing competition for the dwindling public monies available to fund public improvements and betterment projects of all sorts, this case presents unique public policy considerations and has potentially sweeping

practical implications." (RTD's Opening Brief at 2.)

RTD's new argument is that this is a case of little moment. Certainly to the property owners who must foot the $200 million bill under an unfair election scheme, it is a case of extreme significance. As to the implications beyond this case, RTD's own words speak for themselves. The significance of this case was not lost on the California Supreme Court in granting review, and certiorari is appropriate here.

II. PETITIONERS HAVE PERFECTED THEIR CHALLENGE TO THE ELECTORAL PROCEDURES.

Without citing a single case or other authority, RTD raises the new argument that Petitioners' claims are "academic" and have somehow not been perfected for review because they did not file the petition with the required signatures to secure a vote under California Public Utilities Code § 33002.2.[1] It is unclear whether this is a ripeness argument, exhaustion of remedies claim, or some other unnamed defense. What is clear is that RTD's position has no merit whatsoever. RTD made this argument in both the California Court of Appeal and the California Supreme Court. In deciding the case on the merits, neither court even mentioned the issue.

Petitioners are obviously interested parties by virtue of their obligation to pay the assessments. Beyond that threshold standing requirement, there are no prerequisites to making a facial challenge to the validity of a

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[1] In its amicus curiae brief, the Los Angeles County Transportation Commission makes the same argument, referring to the Petitioners' challenge as "hypothetical."

statute. Where a statute such as Public Utilities Code §§ 33000, *et seq.*, is unconstitutional on its face, a plaintiff is not barred from seeking judicial relief without exhausting administrative remedies [*Ebel v. City of Garden Grove*, 120 Cal. App. 3d 399, 409 (1981)], or on ripeness grounds. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386, 47 S. Ct. 114, 71 L. Ed. 303, 310 (1926); *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980); *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146-47 (9th Cir. 1983).

The petition process suffered from the same constitutional infirmities as the vote allocation scheme: to qualify for an election, the statute required a petition of at least 25 percent of the assessed value (*i.e.*, acquisition value) of real property within the district while the basis of the tax was square footage. Pub. Util. Code §§ 33002, 33002.2. Petitioners are not required to exhaust an unconstitutional remedy in order to challenge it.

There simply is no justification to support the allocation of votes in this poorly conceived statutory scheme. The opinion of the Supreme Court of California stands as an example of the worst kind of rationalization of an unfair burden on constitutional voting rights. It should not be permitted to stand as an example of what government can do, to wit, whatever it wants.

Respectfully submitted,

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